



March 19, 1999

Mr. Richard D. Monroe
General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 E. 11th Street
Austin, Texas 78701-2483

OR99-0776

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 122874.

The Texas Department of Transportation (the “department”) received a request for the “video tape(s) of the entire mock trial that was recorded on video tape by Travel Division videographers for future use.” You contend that the requested information is excepted from public disclosure by section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

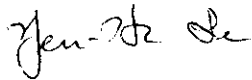
Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

The department received two EEOC complaints which allege race discrimination and retaliation. We conclude that you have shown that litigation is reasonably anticipated. The requested videotape is used by the department for training and contains a mock trial of a case concerning gender discrimination and retaliation. Based on your arguments and the information before us, we conclude that you have not shown that the requested videotape relates to the anticipated litigation. Thus, you may not withhold the requested information pursuant to section 552.103(a).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/ch

Ref.: ID# 122874

Enclosures: Submitted videotape

cc: Mr. Tyrone Hamilton
4931 Culmore
Houston, Texas 77021
(w/o enclosures)